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# Supreme Court of the United States

**October Term, 1932.**

**No. 526.**

THE BALTIMORE & OHIO RAILROAD COMPANY, A CORPORATION, AND WESTERN MARYLAND RAILWAY COMPANY, A CORPORATION, *Petitioners*,

v.

A. SPATES BRADY, *Respondent*.

## BRIEF FOR RESPONDENT.

GEORGE T. BELL,
*Attorney for Respondent.*

SAMUEL T. SPEARS,
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v.

A. SPATES BRADY, *Respondent.*

---

## BRIEF FOR RESPONDENT.

---

### STATEMENT.

This is an action for damages sustained by respondent as the result of unlawful acts and practices of petitioners in misclassifying his coal mine and failing and refusing to supply cars thereto in which to ship the coal.

1. Prior to the institution of the action, the Interstate Commerce Commission found that the acts and practices complained of had subjected respondent to undue prejudice in the matter of car supply and, upon a later hearing, that he had sustained damages in the sum of $57,735.11, but that he might have reduced his loss to $12,838.31, if he had accepted a certain "offer" relating to the furnishing of cars (*Brady v. Baltimore & O. R. Co.*, 112 I. C. C. 244; 152 I. C. C. 327; R 9, 19, 20, 26-9). Petitioners refused to pay even this amount and respondent instituted suit in the District

Court under Section 16 (2) of the Interstate Commerce Act (49 U S C A, Ch. 1, Sec. 16 (2)), asking judgment for the full amount of his damages, to wit, $57,735.11, with interest from April 1, 1923, and contending that the Commission's action in reducing the amount to $12,838.31 was beyond its powers, erroneous as a matter of law, and void.

2. Petitioners demurred to the petition instituting the suit, first generally on the ground that it was insufficient in law, and later specially on the ground that it was for an amount in excess of the Commission's award and that the District Court had no jurisdiction "to consider, review, revise or reverse" the award (R 31-33). After the demurrers were overruled, there was a jury trial which resulted in a verdict and judgment for respondent in the sum of $63,048.60, with interest from August 7, 1931, the date of the verdict (R 36). Upon appeal to the Circuit Court of Appeals for the Fourth District, the judgment was affirmed (*Baltimore & O. R. Co. v. Brady*, 61 F. (2d) 242; R 82, 99). This Court granted certiorari (R 102).

3. As the record in the Court below contained no bill of exceptions, the trial judge having declined to sign petitioners' bill because presented too late (*Brady v. Baltimore & O. R. Co.*, 56 F. (2d) 231, R 69, 76; mandamus denied *Baltimore & O. R. Co. v. Baker*, 58 F. (2d) 627; certiorari denied, id. No. 121, October Term, 1932), the only question open is whether the judgment in respondent's favor is supported by the petition.

The petition (R 1) shows that from October 14, 1922 to April 1, 1923, a period of car shortage, respondent owned and operated a coal mine on the Coalton branch of the Baltimore & Ohio between and adjacent to mines of the West Virginia Coal & Coke Company, a competitor, on the same and another branch of that railroad; that by agreement between petitioners effective during the period, the

Western Maryland was granted trackage rights over the branches to reach and serve the Coal Company mines; that the Western Maryland published and had in effect schedules of rates on coal from the Coal Company mines to interstate destinations; that petitioners each had in force rules governing the rating of mines and the distribution of cars thereto on their respective lines; that these rules and certain decisions of the Commission required that during periods of car shortage available cars should be distributed pro rata among the mines in accordance with their ratings on their orders if less than their ratings; that these rules and decisions permitted the operator of a mine reached by two railroads to order 100 per cent or less of its rating from either road or to divide the orders between the two in any way his judgment dictated, provided the combined orders did not exceed 100 per cent of the mine rating, and the mine was entitled to its pro rata share of the available cars on the basis of such orders and to ship the coal loaded therein via the railroad which furnished the cars (R 2-3).

That as a result of the trackage agreement and rate schedules referred to, the Coal Company mines acquired the status of mines located on and reached by two railroads with the right, which it exercised, to order and receive cars from, and to ship via, either or both railroads on the basis of such divisions of 100 per cent of the mine ratings as its judgment dictated; that the said trackage agreement and Western Maryland rate schedules did not name respondent's mine, and he was denied the right to order and receive cars from, and to ship coal via, either or both railroads as his judgment dictated; that he repeatedly requested petitioners to accord his mine the status of one located on both railroads with the right to order and receive cars from, and to ship coal via, either or both railroads as his judgment dictated, but his requests were denied; that he filed written orders for cars with the Western Maryland

but that railroad, although it honored the Coal Company's orders and placed cars for loading at its mines, refused to honor his orders and with a single exception refused to place cars at his mine, whereupon he ordered cars, and received a reduced supply, from the Baltimore & Ohio; that these discriminatory acts and practices of petitioners were unjust, unduly prejudicial and unlawful in violation of the Interstate Commerce Act; that if he had been permitted to secure his allotment of cars from and to ship his coal via either or both railroads as his judgment dictated from day to day, he would have chosen the Western Maryland and secured his entire supply of cars from, and shipped his entire output via, that railroad because it developed from day to day that the Western Maryland had a better supply than the Baltimore & Ohio; that his orders to the Western Maryland entitled him to receive 818.1 cars of an average marked capacity of 50 tons each; that he actually received only 372.8 such cars; that the railroads urged him to load all cars as heavily as possible; that he loaded the cars he received to an average of 53.55 tons per 50-ton car and would have loaded the additional cars to the same average loading; that the state of the market was such that he could have sold the additional output at the same average prices as the coal actually produced; and that as a result of petitioners' unlawful acts and practices, his lost profits on the additional coal he would have produced and sold and his increased costs of mining and selling the coal actually produced and sold aggregated $57,735.11, for which amount with interest from April 1, 1923, he was entitled to judgment against petitioners (R 3-5).

The petition further shows that respondent filed a complaint with the Commission charging among other things that petitioners' acts and practices in failing and refusing to serve his mine with cars as herein described were in violation of the Interstate Commerce Act, and praying an

award of reparation for the damages which he sustained as a result thereof; that after hearing the Commission found that respondent—

> "should have been permitted to divide his orders for cars to the respective carriers in such divisions of 100 per cent of the rating of his mine as his judgment dictated and cars should have been accordingly furnished in conformity with the supply of cars available on the respective roads",

and that petitioners' acts and practices had resulted in undue prejudice to respondent in the matter of car supply; that the Commission then set the case for further hearing with respect to the amount of damages and found upon such hearing that respondent's excess mining costs and lost profits amounted to $57,735.11 as claimed, and that petitioners did not question the method or figures used in the computation thereof, but held that in computing damages this amount should be reduced by the amount which the loss would have been mitigated if respondent had accepted what was referred to as the "80-20 offer", and also by the amount attributable to the overloading of his cars to an average of 53.55 tons per 50-ton car; that the Commission made revised computations based upon these mitigation-of-loss and average loading findings and arrived at $12,838.31, for which amount with interest (or a total of $17,524.29 to May 1, 1929) a reparation order was entered; that a copy of the order was duly served upon petitioners but they refused to observe the order or make the payment therein required; that the mitigation-of-loss and average loading findings and deductions were beyond the power of the Commission, erroneous as a matter of law, and void; and that respondent was entitled to judgment not only for the amount of the reparation order with interest but also for such additional amount as would make an aggregate

sum equal to the full amount of his damages, to wit, $57,735.11 with interest from April 1, 1923 (R 5-9).

The two reports and reparation order of the Commission were attached as exhibits to the petition. The first report dealt with the administrative questions involved and shows that respondent actively competed with the Coal Company in the sale of coal; that his mine was entirely dependent upon the Baltimore & Ohio for car supply and that prior to October 14, 1922, the same thing was true of the Coal Company mines on the Coalton branch (R 11); that on October 5, 1922, a trackage agreement was entered into whereby the Western Maryland was given the right, effective until April 1, 1923, to move 90 loaded cars per day from the Baltimore & Ohio branches (R 12); that this was "about" the capacity of the Coal Company mines and "what they had been used to shipping" (R 15); that under the rules then in effect a mine served by two roads, to wit, a "joint" mine, had the right to order 100 per cent of its rating from either road or 75 per cent from each road, but in December, 1922, this was changed so that it could order 100 per cent of its rating from either road or divide its orders between the two as desired provided the combined orders did not exceed 100 per cent of its rating (R 13); that petitioners "contended" that they had an "understanding" with the Coal Company whereby its mines ordered 80 and 20 per cent of their ratings from the Western Maryland and B. & O. respectively, and that a similar "arrangement" was offered to respondent but he declined (R 13-14); that the 80-20 arrangement was adapted to the needs of the Coal Company, based upon its past shipments, and the result of conference and agreement with its president (R 16); that although petitioners "contended" that the object of the agreement was to give the Western Maryland a dependable source of fuel supply, the Coal Company also shipped commercial coal under the agreement (R 16-17);

that the Coal Company mines operated "practically at capacity" during this period and were able to maintain a good supply of labor to the detriment of respondent due to inadequate car supply to his mine (R 17); that a mine served by two roads enjoys advantages not possessed by a mine served by only one and that the reasonable enjoyment of these advantages should be protected (R 18); that carriers may not, by withholding their equipment or facilities, dictate or control the markets which a particular shipper shall seek or enjoy, while adapting their services to the needs of a competing shipper (R 18); that by fixing the proportions of car supply which the Coal Company would be furnished by the respective carriers in conformity with its customary shipments and after conference with its president, the advantages referred to were made available to the Coal Company (R 18); that like consideration was not given to respondent, but he was offered arbitrarily and without regard to the requirements of his business that which had been "arranged" for his competitor after deliberation (R 18); that such service would not have been similar or on a basis of equality between shippers and respondent was thereby subjected to undue and unreasonable disadvantage (R 18); that respondent should have been permitted to divide his orders for cars to the respective carriers in such divisions of 100 per cent of the rating of his mine as his judgment dictated and cars should have been accordingly furnished in conformity with the supply on the respective roads (R 19); and finally that upon all the facts of record the acts and practices of petitioners, whereby they accorded Western Maryland service to the Coal Company mines "while failing to accord similar service" to respondent's mine located intermediate thereto, resulted in undue prejudice to him in the matter of car supply (R 19).

The second report dealt with the amount of damages (R 21) and shows that respondent ordered a 100 per cent supply of cars from the Western Maryland, but since that carrier would not honor his requisitions on that basis, he also placed his orders with the B. & O. (R 21); that he was entitled to receive 818.1 cars from the Western Maryland during the period, but actually received only 5 cars from that road and 367.8 cars from the B. & O. (R 22); that he accepted the cars furnished and loaded them with an average of 53.55 tons per 50-ton car (R 22); that the figures upon which he claimed a loss of $57,735.11 were not questioned (R 26); and that the amount claimed as damages should be reduced only because of the mitigation-of-loss and average loading findings previously referred to, as to which the report states (R 27)—

> "It is a familiar rule that a party suffering loss from breach of duty ought to do what a reasonable man would do to mitigate his loss. (Citing cases). That principle is applicable here. By reasonable action on his part in accepting defendants' 20-80 offer, complainant could have increased his production to the extent of 1,825 tons in October, 1,940 tons in November, 3,960 tons in December, 4,950 tons in January, 2,545 tons in February, and 1,485 tons in March. To this extent his damage was due to his own action and defendants cannot reasonably be expected to compensate him therefor. Complainant also erred in computing the tonnage that he could have produced, if he had been allowed to avail himself of the Western Maryland's car supply, by using an average loading of 53.55 tons per car. Under the rules 50 tons is used in determining the daily car rating and is likewise used in the rules governing distribution to coal mines."

4. About the time the petition in this action was filed in the District Court, respondent filed a bill in equity in the same court against the Commission and the United States,

attacking the mitigation-of-loss and average loading findings and deductions as beyond the power of the Commission, erroneous as a matter of law, and void (R 1, 8-9). It was represented that unless they were set aside and annulled, he would be subjected to irreparable injury for which he had no plain, adequate and complete remedy at law. The court was asked to set aside and annul them, direct the Commission to make a supplemental order consistent with the decree of the court, and to grant such other and further relief, etc. Petitioners intervened, became parties respondent, and participated in the hearing. Upon respondents' motions, the court (consisting of District Judge Baker and Circuit Judges Parker and Northcott) dismissed the bill for lack of jurisdiction "for the reasons stated", one of which was that "no irreparable injury is to be apprehended from reparation orders of the Commission, that any errors therein may be corrected in the trial provided for by statute, and that resort to injunction to set aside such orders is not permissible" (R 8, 97-8; *Brady v. Interstate Commerce Com.*, 43 F. (2d) 847, 848, 849). The decree of dismissal was affirmed by this court. (*Brady v. United States,* 283 U. S. 804).

## QUESTIONS PRESENTED.

The question whether the judgment in respondent's favor is supported by the petition divides itself into minor questions as follows:

1. Whether the petition alleges a cause of action upon which suit may be maintained.
2. Whether the petition shows that respondent sustained damages to the amount adjudged in his favor.
3. Whether, in any event, respondent is limited in his recovery to the amount of the Commission's award. In this connection, there is the additional question—

4. **Whether respondent's right of action for, and the District Court's jurisdiction to grant recovery of, a greater amount than the Commission's award are *res judicata*, in view of the decree in the equity proceeding.**

## SUMMARY OF THE ARGUMENT.

### I.

*The petition alleges a cause of action upon which suit may be maintained. The assailed acts and practices of the railroads represented questions administrative in character, requiring the Commission's finding that they were in violation of the Act and its prescription of the standard that should have prevailed as prerequisites to the maintenance of a suit thereon. The petition shows that the Commission decided the questions and prescribed the standard. Its action thereon is conclusive.*

1. Petitioners' position in this Court on the question whether respondent's cause of action presented questions administrative in character is the direct reverse of that presented to the Court below.

2. The basic question before the Commission was one of mine classification for purposes of car distribution, and was within the exclusive jurisdiction of the Commission. Respondent was therefore compelled to resort to that tribunal in the first instance.

3. The Commission's finding of undue prejudice and its prescription that petitioners should have accorded respondent's mine the rights and privileges of a two-road or "joint" mine are conclusive on the courts. With respect to such matters, "this court has no concern with the correctness of the Commission's reasoning".

4. The purpose of the trackage contract is not of legal significance, nor is the fact that respondent desired 100

per cent Western Maryland cars while the Coal Company desired 80 per cent Western Maryland and 20 per cent Baltimore & Ohio cars. Regardless of hypothetical illustrations to the contrary, respondent's mine would have operated at a lesser percentage of capacity on 100 per cent Western Maryland cars than the Coal Company mines *actually* operated on the cars they received.

## II.

*The petition shows that respondent sustained damages in at least the amount adjudged in his favor. The petition complied with the statute by setting forth the causes for which respondent claimed damages and the Commission's order (including the reports made parts thereof) in the premises, and nothing contained therein required any deduction from the amount sued for, whether the petition proper is considered alone or the Commission's reports are considered incorporated therein. In any event, the mitigation-of-loss and average loading findings quoted and referred to in the petition were beyond the powers which the Commission could properly exercise in this case, erroneous as a matter of law, and void.*

1. Petitioners, having failed before the trial to raise any question in respect of alleged inconsistencies and contradictions in the petition, are estopped from doing so after judgment.

2. The petition did not adopt the Commission's findings quoted therein or its reports attached thereto, or incorporate them for the purpose of cutting down the amount sued for.

3. The petition put the railroads upon notice that respondent intended to attack the prima facie correctness of the Commission's findings as to the amount of his damages

and to present additional evidence in support of his claim at the trial.

4. The verdict and judgment were for an amount considerably less than the amount sued for. There being no bill of exceptions in the record, it must be assumed that "the case was fairly and fully submitted in the charge of the judge to the jury" and that there was "testimony tending to show damages" to the amount of the verdict and judgment.

5. In any event, the mitigation-of-loss finding and deduction were beyond the powers which the Commission could properly exercise in this case, or erroneous as a matter of law and void, because (a) they were inconsistent with the Commission's previously-prescribed administrative standard; (b) they were, as the Commission's report discloses, unsupported by the only kind of evidence that could legally support them; (c) respondent's action in respect of the 80-20 offer was entirely reasonable; (d) there was nothing to prevent petitioners from placing *cars* at respondent's mine on the 80-20 basis and thus have averted his losses to that extent; (e) respondent did all the mitigation-of-loss rule required by ordering cars from both carriers and accepting and loading all cars actually tendered to him; and (f) petitioners' failure to accord respondent his rights in the premises was a continuous tort and violation of statutory duty, hence the mitigation-of-loss rule was inapplicable. The average loading deduction was likewise void because the Commission's report discloses that the finding in respect thereof does not, as a matter of law, support the deduction.

## III.

***Respondent's right of action and the District Court's jurisdiction were not limited in maximum amount to the Commission's award. This is a Section 16 (2) suit for damages resulting from violations of the Interstate Commerce Act, filed pursuant to a reparation order of the Commission not complied with by the carriers. The fundamental principles of equality and uniformity underlying the whole statute, as well as the plain language of section 16 (2) itself, compel the conclusion that in such suit the plaintiff has the right to recover, and the District Court the jurisdiction to give judgment for, the full amount of damages sustained, even though such amount is greater than the Commission's award.***

1. The Act provides two alternative methods or means for the recovery of damages, in both of which, so this Court has held pursuant to the fundamental principles of equality and uniformity which underlie the whole statute, the same period of limitation applies, the cause of action accrues at the same time, the same starting basis (a finding by the Commission on the administrative question) is required, and the same rules of law prevail. The same fundamental principles require that both methods shall be subject also to the same judicial machinery for correcting errors and mistakes.

2. The section 16 (2) suit is an adjunct of the method of procedure before the Commission with the same corrective function, scope and power as the new trial in the alternative method of procedure in the District Court. As in a new trial in the District Court the amount of the reversed judgment is not the maximum measure of permissible recovery, so in a Section 16 (2) suit the amount of the Commission's award is not.

3. Section 16 (2) specifically provides that "such suit *shall* proceed in *all* respects *like other civil suits for damages*" with two, and only two, exceptions, neither of which limits recovery to the Commission's award; and the Courts are not at liberty to ingraft other exceptions. The shipper's rights under "such suit" were materially enlarged by the Hepburn Act.

4. This Court has sustained a greater recovery than the Commission's award (correctly computed) in one case, has clearly intimated in other cases that a District Court has jurisdiction so to do in a Section 16 (2) suit, and has specifically held that "such suit is not on the award as such."

5. To construe Section 16 (2) as permitting recovery of the full amount of the plaintiff's loss even though greater than the Commission's award is necessary to avert injustice in cases where, as here, the Commission's delay in determining the administrative question deprives the plaintiff of his right to make a voluntary election of Section 9 remedies.

6. The decisions cited by petitioners in support of the alleged "implication" therein that a reparation order less in amount than the sum claimed is, as to the diminution, an unreviewable negative order were all in cases presenting administrative questions, and in which the Commission dismissed the complaints. The proceedings never arrived at the stage where reparation was even considered. The negative orders entered were not reparation orders in any sense of the term; they were negative pronouncements addressed to the administrative questions. In the instant case, respondent did not attack the Commission's administrative finding and standard; on the contrary, he asked the District Court to "enforce" them fully.

## IV.

*The questions whether respondent had a right of action for, and the District Court jurisdiction to grant recovery of, a greater amount than the Commission's award are res judicata, having been determined by the decree in Brady v. Interstate Commerce Com., 43 Fed. (2) 847, affirmed Brady v. United States, 283 U. S. 804.*

1. The foregoing questions and rights were contested issues in the equity proceeding and, as petitioners were parties respondent therein and participated in the hearing, they are bound by the special court's decision that it was without jurisdiction "for the reasons stated", one of which was that no irreparable injury is to be apprehended from reparation orders and that errors therein may be corrected in the Section 16 (2) suit. The decision on these questions and rights was not *obiter*.

2. The fact that *res judicata* was not pleaded by respondent is not fatal to its application here. Respondent was the plaintiff in the law action, his petition therein referred to the pendency of the equity proceeding, and both cases were being carried on simultaneously in the same District Court.

3. Even though the special court's determination of the foregoing questions was erroneous, nevertheless it is the law of this case and may not be disputed.

4. This Court affirmed the decree of the special court in the equity proceeding and thereby sanctioned the validity of the decision as *res judicata* of all questions and rights raised therein between the parties thereto, even though the affirmance may have been based on grounds other than those named by the special court.

## ARGUMENT.

### I.

**The petition alleges a cause of action upon which suit may be maintained. The assailed acts and practices of the railroads presented questions administrative in character, requiring the Commission's finding that they were in violation of the Act and its prescription of the standard that should have prevailed as prerequisites to the maintenance of a suit thereon. The petition shows that the Commission decided the questions and prescribed the standard. Its action thereon is conclusive.**

1. Petitioners have reversed their position on this subject. In the court below, they presented three contentions in respect thereof. Their first contention, that no cause of action is alleged because respondent was not entitled to Western Maryland service, was tantamount to an admission that he had no right to such service capable of being enforced initially in a court and hence that the question whether his mine was entitled to a two-road status was administrative. Their second contention, that if so entitled he was not prejudiced because the Coal Company was restricted to the 80-20 arrangement, was tantamount to insisting that if respondent's mine was entitled to a two-road status, the Commission had erroneously decided the additional administrative question presented by the so-called 80-20 offer. They further contended that the Commission had erroneously decided the basic question of undue prejudice in view of the fact that the advantages accorded the Coal Company mines were brought about by means of a mere trackage agreement. But now that the court below has demonstrated the significance of the fact that the questions were administrative, petitioners take the position in this Court that they first started to take in their reply

brief in the court below, to wit, that the questions were not administrative.*

2. The questions involved were clearly administrative. They were of a character not initially cognizable in a court. The basic complaint was against petitioners' discriminatory classification of respondent's mine as a one-road mine, contemporaneously with their classification of the similarly-located and competing Coal Company mines as two-road mines, for purposes of car distribution. Neither of the carriers could have been mandamused to put his mine in their category of two-road mines, nor could their classification of his mine as a one-road instead of a two-road mine been enjoined, independently of an order of the Commission. Nor could respondent have successfully attacked the discriminatory classification of the respective mines, or the discriminatory car distribution which resulted therefrom, as an incident to an action for damages in court. *Baltimore & O. R. Co. v. United States ex rel Pitcairn Coal Co.*, 215 U. S. 481, 486-7; *Mitchell Coal & C. Co. v. P. R. R. Co.*, 230 U. S. 247, 257-8.

The basic question here was somewhat akin to that presented in *Director General v. Viscose*, 254 U. S. 498, 503-4, where a shipper of silk secured an injunction restraining the Director General of Railroads from excluding silk from the category of commodities transported by railroads. He contended in this Court that "there was no administrative question" and that the "thing presents a question of law for the courts" (arguments of counsel, 65 Law Ed. 373-4). But this Court held that "exclusion in this case was an attempted classification *** within the exclusive initial jurisdiction of the Commission."

In their final analysis, the questions concerned car distribution. They were somewhat similar to that presented in *United States v. New River Co.*, 265 U. S. 533,

*Moreover, petitioners treated the questions as administrative all through the litigation before the Commission; they made no request for a reconsideration of the Commission's findings in the first report, and made no attack upon them in the hearing on damages (R 26), or on their demurrers (R 32-3).

541-2, where joint mines (made so by means of a trackage agreement, 62 I. C. C. 269, 272-3) attacked an order of the Commission limiting such mines to 100 per cent of their ratings when ordering cars from both carriers serving them. They insisted before the Commission that they had a legal right to order 100 per cent of their ratings from each carrier (62 I. C. C. p. 273); and in this Court, that they had a "legal right to a fair share of the car supply of each carrier". But this Court held that "the Commission's jurisdiction is exclusive".

As the questions were administrative, the Commission's finding thereon and its prescription of the standard that should have prevailed were necessary prerequisites to maintaining a suit for damages. *Morrisdale Coal Co. v. P. R. R. Co.*, 230 U. S. 304, 313. The petition shows that respondent complied with this requirement. He secured the Commission's finding that petitioners' acts and practices, whereby they accorded Western Maryland *service* to the Coal Company mines while failing to accord similar *service* to his mine, had subjected him to undue prejudice in the matter of car supply. He also secured the Commission's prescription of the standard that he "should have been permitted to divide his orders for cars to the respective carriers in such divisions of 100 per cent of the rating of his mine as his judgment dictated and cars should have been accordingly furnished in conformity with the supply of cars available on the respective roads".

The petition further shows that the foregoing finding and standard were prescribed by the Commission upon a consideration of "all the facts of record", including the so-called 80-20 offer (the form, date, source and duration of which are not disclosed) and the fact that respondent accepted all real offers of transportation, to wit, CARS, actually tendered to him by the carriers. Both finding and standard were the prescriptions of a body "informed by experience" in such matters, and are conclusive except on

grounds which have no basis in this record. *Mitchell Coal & C. Co. v. P. R. R. Co.*, 230 U. S. 247, 258; *Morrisdale Coal Co. v. P. R. R. Co.*, 230 U. S. 304, 313. With respect to such administrative matters, "this court has no concern with the correctness of the Commission's reasoning, or with the soundness of its conclusions." *Virginian R. Co. v. United States*, 272 U. S. 658, 665-6.

3. Conceding for the moment that the complaint to the Commission raised an administrative question, petitioners also contend that the Commission "did not decide the question on that basis". Reference is made to the statement in the Commission's report that "it is not necessary * * to determine whether or not the *Coal Company** was entitled to order its cars in conformity with *existing* car service rules for joint mines and as to that we express no opinion" (R 14). The report discloses the reason. Originally, one of the rules permitted a mine served by two carriers to order 75 per cent of its rating from each if it ordered cars from both. This rule was condemned by the Commission December 11, 1922, and a new rule established which permitted such a mine to order a maximum of only 100 per cent of its rating from both carriers (R 13). The Commission decided to make this new rule the basis of the standard that should have prevailed at respondent's mine and hence did not consider it necessary to decide whether the Coal Company was entitled to order its cars in conformity with the old rule. The fact that the Commission decides an administrative question one way rather than another does not make the question any the less administrative.

Petitioners urge that the Commission did not decide that either the Coal Company or respondent was entitled to a joint mine status. The contention is baseless. The service status enjoyed by the Coal Company mines and that pre-

*Unless otherwise stated, all italics (emphasis) in this brief have been supplied.

scribed as the standard that should have prevailed at respondent's mine was a joint mine or two-road status. In *United States v. New River Co.*, 265 U. S. 533, 542, it was said—

> "An operator of a joint mine is not confined to any one carrier serving it. It may order from each carrier; but the total number of cars ordered may not exceed the gross daily rating of the mine. It may select the carrier which, at the time, has the better car supply, and receive its pro rata share of that supply according to its gross daily rating, based on its capacity to ship by all carriers. It may choose between the carriers to secure the service, connections, and markets it desires to have."

Lastly on this subject, petitioners contend that respondent suffered no *undue* prejudice because the purpose of the trackage agreement was the Coal Company's fuel contract with the Western Maryland and he had no such contract; and in fact that he suffered no prejudice at all because an "allotment of cars" of equal percentages as made to the Coal Company was made to him. While the Commission's finding that respondent was subjected to undue prejudice is conclusive, the contentions are baseless as well as untenable. The purpose of the trackage contract is not of legal significance (*Virginian R. Co. v. United States*, 272 U. S. 658, 664), but the fact is, and the Commission's report clearly discloses, that the whole scheme was framed up by and for the benefit of the Coal Company, and that the Coal Company then used it to get the Western Maryland fuel contract (R 14-18); indeed, when respondent complained to the president of the Western Maryland, he was told to see the president of the Coal Company (R 16).

In regard to the statement that cars were furnished to the Coal Company mines on the 80-20 basis, the report shows that while cars were furnished in those *proportions*,

they were furnished in sufficient *quantities* that "the mines of the Coal Company were operated practically *at capacity* during this period", i. e., practically at 100 per cent (R 17). In marked contrast to this unduly preferential car supply to the Coal Company mines during a period of acute car shortage, the supply furnished to respondent's mine was sufficient to operate it at only 22.9 to 34.96 per cent of capacity; and even if it had been permitted to secure its entire allotment from the Western Maryland, the supply would have been sufficient to operate it at only 44.5 to 61.91 per cent (R 22). As against what actually transpired, "simple illustrations" like those presented on page 11 of petitioners' supplemental brief are worthless.

Moreover, neither report of the Commission contains any concrete finding or statement that respondent was tendered CARS in 80-20 proportions, or that he rejected CARS in those or any other proportions. On the contrary, the second report shows that he accepted and loaded all cars furnished to his mine. The so-called 80-20 offer (the form, date, source and duration of which are not disclosed by either report) must have been a mere letter or verbal offer, not once backed up with actual tenders of CARS in those proportions or the publication of Western Maryland rates. The ultimate finding of the Commission was that respondent had been subjected to undue prejudice in the matter of CAR SUPPLY, and that CARS should have been furnished to his mine by the respective carriers based on orders divided in such proportions as his judgment dictated. The fact that the Coal Company desired and received CARS divided 80 per cent Western Maryland and 20 per cent B. & O., while respondent desired 100 per cent Western Maryland, is immaterial. "Such election is the voluntary choice of the shipper". *Bell & Zoller Coal Co. v. B. & O. S. W. R. Co.*, 74 I. C. C. 433, 439.

The Commission's findings on the administrative ques-

tion were in no sense arbitrary or unreasonable. If petitioners' contentions are intended as representations to the contrary, they are without merit.

II.

**The petition shows that respondent sustained damages in at least the amount adjudged in his favor. The petition complied with the statute by setting forth the causes for which he claimed damages and the Commission's order (including the reports made parts thereof) in the premises, and nothing contained therein required any deductions from the amount sued for, whether the petition proper is considered alone or the Commission's reports attached as exhibits are considered as incorporated therein. In any event, the mitigation-of-loss and average loading findings and deductions quoted and referred to in the petition were beyond the powers which the Commission could properly exercise in the case, erroneous as a matter of law, and void.**

The statement of causes for which respondent claimed damages set out in paragraphs 3-9 of the petition shows that he sustained losses in the sum of $57,735.11 as the result of petitioners' unlawful acts and practices. The petition prayed judgment against them for this amount with interest from April 1, 1923, or a total of about $85,602.00 to the date of the judgment order. The judgment was for $63,048.60 with interest from August 7, 1931, or a total of about $63,363.00 to the date of the judgment order.

But petitioners contend that a subsequent paragraph or subdivision of the petition (No. 10; R 5) and the Commission's report in effect contain the inconsistent and contradictory allegation that respondent's damages over and above the Commission's award were "due to his own action", and hence that the petition does not support the judgment. The Commission's award was for $17,524.29 as

of May 1, 1929, which, with interest to the date of the judgment order, makes a total of about $19,978.00.

1. The sufficiency of the petition to support the judgment is not open to attack by petitioners on the foregoing ground. This case was tried in the Northern District of West Virginia. The West Virginia Code, 1931 (Chap. 56, Art. 4, Sec. 36), effective January 1, 1931, provides that—

> "All demurrers in civil cases shall be in writing and shall state *specifically* the grounds of demurrer relied on, and no grounds shall be considered other than those so stated, except by the court of its own accord, but the demurrant may, by leave of court, amend his demurrer by stating additional grounds, or otherwise, *at any time before the trial at law* or final hearing in equity".

Furthermore, it had been held as long ago as 1899 by the supreme court of that state that "a pleading when presented is presumed to be sufficient and it is the duty of a demurrant if he thinks it insufficient and desires to take advantage of it, at least to call the court's attention to the defects or imperfections in such pleading." *Koontz v. Koontz*, 47 W. Va. 31, 34.

The demurrers in this case, although filed with the clerk of the court in March, 1930, were not presented to and passed upon by the trial judge until July 14, 1931, or over six months after the above code provision became effective (R 34). The only grounds stated "*specifically*" in them were that the demand or claim asserted in the petition was for an amount largely in excess of the Commission's award and that respondent has no right of action to cause the court, and the court no jurisdiction, "to consider, review, revise or reverse" the Commission's award. These grounds challenged the jurisdiction of the court, not the sufficiency of the petition. As petitioners did not raise before the trial any objection to the petition based upon alleged in-

consistencies and contradictions therein, they are estopped from doing so after judgment. Their failure to raise such an objection *specifically* in their demurrers was tantamount to a waiver of the point. Any and all inconsistencies, defects and imperfections in the petition were cured by the verdict. *Township of Lincoln v. Iron Co.,* 103 U. S. 412, 415; *Palmer v. Arthur,* 131 U. S. 60, 64; *Long v. Campbell,* 37 W. Va. 665, 671.

A carrier may waive such objections in a section 16 (2) suit. *Mitchell v. Lehigh Valley R. Co.,* 236 U. S. 412, 426-7; *Pennsylvania R. Co. v. Minds,* 250 U. S. 368, 374-5.

2. In any event, the petition complied with the statute, sued for a greater amount than the judgment, and nothing contained in the pleading required any deduction from the amount sued for. In setting forth the causes for which respondent claimed damages and the order of the Commission in the premises, including the reports made parts thereof, the petition complied with Section 16 (2) of the Act. *Vicksburg, Shreveport & P. R. Co. v. Anderson-Tully Co.,* 256 U. S. 408, 415. In quoting the mitigation-of-loss and average loading findings and deductions and challenging their correctness, it put petitioners upon notice that respondent intended to attack the prima facie validity of the quoted findings and to present additional proof in support of his claim at the trial. The petition did not adopt the quoted findings or attached reports in any respect or for any purpose inconsistent with the primary allegations in paragraphs 3-9 and the *ad damnum* in paragraph 12. It certainly did not incorporate them for the purpose of cutting down the amount sued for. The annexation of an exhibit to a pleading does not amount to an allegation that the statements and recitals contained therein are true and correct. *Sweeney v. Johnson,* 130 Pac. 997, 998.

First considering the petition alone and without regard to the reports attached as exhibits, *and giving heed to the*

*rule that a pleading must be construed in its entirety,* it is clear that the direct and unqualified allegations in paragraphs 6 and 7 that petitioners failed and refused to make the trackage agreement apply to respondent's mine, to publish Western Maryland rates therefrom, to accord a two-railroad status thereto, and to honor his requisitions for Western Maryland cars, and the allegation in paragraph 9 that he accepted and loaded all cars received, are tantamount to a denial that petitioners tendered, or he received, any "offer" of cars which was subsequently rejected. A coal mine's orders for cars in accordance with its rating are the legal equivalents of tenders of freight for transportation. *Rules Governing Rating of Coal Mines,* 95 I. C. C. 309, 311. Therefore, the allegation that respondent filed written orders for cars with the Western Maryland which with a single exception that road refused to honor on any basis constitutes an averment that it made no "offer" to transport his freight by placing cars for loading at his mine. The Interstate Commerce Act provides that no carrier may engage in the transportation of property or the furnishing of cars therefor unless and until rate schedules have been duly published and filed, and thereby recognizes no other way by which a carrier may "offer" its services. *Sections* 6 (7) and 1 (3). Therefore, the allegation that the Western Maryland refused to publish rates from respondent's mine constitutes an averment that that carrier refused to put itself in a position to make or join in a legal "offer" of transportation and cars, 80-20 or otherwise, to respondent.

The quoted findings in paragraph 10 of the petition that "by reasonable action on his part" in accepting the unexplained "80-20 offer", respondent could have increased his production and that "to this extent his damage was due to his own action and defendants can not reasonably be expected to compensate him therefor" were mere conclusions

of the Commission with which respondent flatly disagreed as shown by paragraphs 3-9 of the petition.

So, too, the direct and unqualified allegation in paragraph 9 of the petition that petitioners urged respondent to load his cars "as heavily as possible", that pursuant thereto he loaded them to an average of 53.55 tons per 50-ton car, and that he was entitled to judgment for an amount which took into consideration such loading is tantamount to a denial that the "rules" used in determining the *ratings* of mines expressed in cars and the *distribution* of cars contained any restriction against so *loading* the cars in times of car shortage.

Furthermore, paragraph 11 of the petition contains the unqualified allegation that the mitigation-of-loss and average loading findings quoted in paragraph 10, and the deductions made pursuant thereto, were beyond the power of the Commission, erroneous as a matter of law, and void. In *Interstate Commerce Com. v. Louisville & N. R. Co.*, 227 U. S. 88, 91, 92, this Court held that a finding "contrary to the indisputable character of the evidence" is void, and that "a finding without evidence is beyond the power of the Commission". Therefore, the unqualified allegation in paragraph 11 that the findings quoted in paragraph 10 were beyond the power of the Commission and void is tantamount to an averment that the findings thus assailed were contrary to the indisputable character of the evidence presented to the Commission, and indeed without evidence to support them, and were contrary to the actual facts.

3. Now taking the Commission's reports as incorporated in the petition, exhibit A states that "defendants *contend* that complainant (respondent) was offered the same arrangement but he declined and cannot be heard to complain", and further that "whether or not this is true and whether or not similar service was in fact offered complainant depends upon surrounding circumstances". Among oth-

er "surrounding circumstances" appearing on the face of the report are that the maximum of 90 cars per day which the Western Maryland could move from the Baltimore & Ohio branches under the agreement represented the capacity of the Coal Company mines alone and what those mines alone "had been used to shipping"; that *in the latter part of October, 1922* respondent applied to the president of the Western Maryland for service via that road and his application was denied; and that the ultimate finding and conclusion of the Commission upon all of the facts of record was that petitioners' acts and practices whereby they accorded Western Maryland service to the Coal Company mines, "*while failing to accord similar service to complainant's mine* located intermediate thereto resulted in undue prejudice to complainant".

Exhibit B to the petition shows that respondent accepted and loaded all cars furnished by both carriers, and hence shows that he accepted each and every real offer of transportation made by either or both carriers. It also states that at the hearing on damages a witness for respondent denied that his mine was offered the 80-20 basis, and while it further states that the contrary is shown by testimony of the same witness at the first hearing, questions with regard thereto were thus raised to be passed upon oy the jury in the light of all the evidence, including the reports of the Commission.

Further, in this connection, exhibit B states that "practically all" the evidence introduced by the carriers was in support of the rejected contention that respondent's mine was excessively rated. It also states that the carriers did not question the method or figures used by respondent in his computation of damages, in which was included the computation of lost tonnage at 53.55 tons per 50-ton car. It enumerates petitioners' contentions, none of which was that the rules for rating mines and distributing cars con-

tained a restriction against loading cars as heavily as possible (R 26). These circumstances support the allegation in paragraph 12 that the assailed findings and deductions were void because made without evidence to support them or contrary to the indisputable character of the evidence.

When all these facts and details appearing on the face of the reports are considered in connection with the unqualified allegations in paragraphs 3-9 and 11 and the *ad damnum* in paragraph 12 of the petition proper, it is submitted that the court below was justified in holding that there was nothing in the petition itself which required a deduction from the gross amount of respondent's claim. This holding of the court was made with specific reference to the mitigation-of-loss deduction, but the foregoing analysis of the petition and reports shows that it was equally applicable to the average loading deduction.

Even in those jurisdictions where the common law rule of construing pleadings against the pleader has not been changed, a liberal construction in favor of the pleading is adopted after verdict. *Corpus Juris,* Vol. 49, pp. 115-16. This Court has held that pleadings should receive a reasonable interpretation (*Lockhart v. Leeds,* 195 U. S. 427, 434; *Swift & Co. v. United States,* 196 U. S. 375, 390), and this Court as well as the lower Federal Courts have indicated that petitions in Section 16 (2) suits pursuant to reparation orders should be liberally construed. *Vicksburg, S. & P. Ry. Co. v. Anderson-Tully Co.,* 261 Fed. 741, 745, affirmed 256 U. S. 408, 415; *Southern P. Co. v. Goldfield Consol. Milling & T. Co.,* 220 Fed. 14, 19.

4. In further support of the sufficiency of the petition, and assuming the reports attached thereto as incorporated therein and the 80-20 offer as having been concurred in by both roads and received by respondent, it is contended that in view of the facts found in or derivable from the reports, the mitigation-of-loss and average loading de-

ductions were beyond the power which the Commission could properly exercise in this case, erroneous as a matter of law, and void.

(a) Once the Commission finally finds acts and practices of carriers in violation of the statute and fixes the lawful standard, that standard is conclusive whether it relates to the past, present or future. It is the same as though the standard had been in the statute during the period covered by the case; having been fixed pursuant thereto, it is to all intents and purposes a part of it and hence binding upon all parties concerned, including the Commission when subsequently acting in its quasi-judicial capacity. *Mitchell Coal & C. Co. v. P. R. Co.*, 230 U. S. 247, 258; *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 389.

Here, acting in its administrative capacity, the Commission found that petitioners' acts and practices in according Western Maryland service to the Coal Company mines, while failing and refusing to accord similar service to respondent's mine during the period involved, *and also the so-called 80-20 offer*, were unlawful. It also laid down the standard of service that should have prevailed, to wit, that petitioners should have honored respondent's orders for cars (which were *daily* orders) divided between the two in such divisions of 100 per cent of the *daily* rating of his mine as his judgment dictated, and should have furnished CARS to his mine in conformity with the supply available on their respective roads. But pursuant to the further hearing granted for the sole purpose of determining the amount of respondent's damages on the basis of this standard, the Commission proceeded to treat the single 80-20 offer made on some undisclosed date after the latter part of October 1922, the same as bona fide tenders of cars on each and every day from October 14, 1922 to April 1, 1923; and to treat respondent's refusal or neglect to respond affirmatively to this "offer" made on a single day, the same as a

refusal to accept and load cars actually placed for loading at his mine on each and every day throughout the period. Indeed, the Commission proceeded to treat as lawful the very "offer" which, in its administrative capacity, it had found unlawful because it was arbitrary and made without regard to the requirements of respondent's business.

Furthermore, exhibit B to the petition (the second report) shows on its face that the Commission's action in applying the mitigation-of-loss rule was contrary to the indisputable character of the evidence and, in fact, without the only kind of evidence that could possiby support it. The only conceivable evidence that could justify the application of the mitigation-of-loss rule in a case such as this would be evidence that the complainant shipper had refused to accept and load cars placed for loading at his mine. There was no such evidence in this case. The evidence was that respondent accepted and loaded all cars tendered to him. He accepted all real offers of transportation made to him. The Commission so found in its second report. Moreover, neither report discloses where the 80-20 offer originated, the date it was made, how it was presented, or the duration of the arrangement contemplated by it, although the first report indicates that the date was subsequent to the latter part of October, 1922 (R 16).

A finding made by the Commission without material and relevant evidence to support it, or contrary to the indisputable character of the evidence, is beyond its powers and void. So, also, any finding of the Commission is void if the facts found do not, as a matter of law, support it. *Interstate Commerce Com. v. Louisville & N. R. Co.*, 227 U. S. 88, 91-2; *Interstate Com. Com. v. Union P. R. Co.*, 222 U. S. 541, 547-8.

Even if the undisclosed and unknown is assumed and the 80-20 offer treated as one for the whole period, the Commission's action in respect thereof constituted a misapplication of the mitigation-of-loss rule. While a party suf-

fering loss from breach of duty ought to do what a reasonable man would do to mitigate his loss, "the duty of the injured party is governed by the rules of common sense and fair dealing; he is not required to take such action as might under the circumstances be imprudent and impracticable". *Corpus Juris*, Vol. 17, pp. 767-770. "The amount of care required is not to be measured by *ex post facto* wisdom; he is not bound at his peril to know the best thing to do". *Sedgewick on Damages* (9th Ed.), Sec. 221. Respondent sold his coal on the open market. He did not know more than a day in advance where it was going. The Commission found that the 80-20 arrangement was arbitrary and made without regard to his business. While the Western Maryland car supply was better than the B. & O.'s at the time the 80-20 offer was made, *no one could possibly foresee what the respective supplies would be the following week or month.* A washout might tie up one road one week; some other calamity, the other road the following week. It so happened that the Western Maryland supply continued day by day to be better than the B. & O.'s,* and singularly remained so throughout the period, *but at the time the 80-20 "offer" was made*, no one could possibly know that such was going to be the case. In the circumstances, no prudent coal shipper, selling his coal on the spot market, would have submitted to the arbitrary conditions fixed by the railroad officials to fit the contract business of his chief competitor, and agreed to order his cars and ship his coal day after day, regardless of market or car supply conditions, on a fixed and unchangeable percentage basis, especially where, as here, the Western Maryland refused to prove its good faith by publishing rates from the shipper's mine with the result that in one instance of five cars received from that carrier, he had been compelled to assume $262.23 in over-charges (R 19). Respondent's rejection of

*It was on account of this "day by day" fact that respondent first placed his orders with the Western Maryland.

the empty offer was the act of a prudent man and entirely reasonable, while that which was demanded of him was unreasonable and unjust. A shipper is certainly not required to gamble with his business in order to save carriers from the consequences of their unlawful practices. *Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co.*, 159 Fed. (C. C. A. 1st.) 824, 830-1; *Northern Colorado In. Co. v. Pouppert*, 127 Pac. (Colo.) 125, 128; *McCleneghan v. Omaha & R. V. R. Co.*, 41 N. W. (Neb.) 350, 351; *Fewell v. Catawba Power Co.*, 86 S. E. (S. C.) 947, 950; *United States v. F. & G. Co.*, 236 U. S. 512, 526-7. In the first of these cases, the defendant induced a third party not to comply with a contract to furnish the plaintiff certain machines with the result that the plaintiff suffered damages. In the trial court, the defendant made a contention similar to that made by petitioners here, to wit, that if the plaintiff had used defendant's machines when offered to him, some or all of the damages claimed would have been avoided, and that as the plaintiff had not taken this means to reduce his loss, he was not entitled to recover the damages which resulted therefrom. The Circuit Court of Appeals for the First Circuit said—

> "This, properly interpreted and applied to the circumstances, is equivalent to maintaining that the defendant had a right to shut the plaintiff out from every other market, and to force it to purchase of itself. The law does not countenance a proposition so unreasonable and unjust."

In the *Thomas P. Sheldon*, 113 Fed. 779, 781, (also *Wabash R. R. Co. v. Campbell*, 117 Ill. App. 630, 634), it was said—

> "The rule of *Warren v. Stoddart* requires reasonable conduct on the part of one whose legal rights have been violated; but it should not be invoked by a defendant as a basis for a critical examination of the con-

duct of the injured party, or merely for the purpose of showing that the injured party might have taken steps which were wiser or more advantageous to defendant. Reasonably prudent action is required, not that action which the defendant, upon afterthought, may be able to show would have been more advantageous to him."

Next, the Commission's report (exhibit B) shows that respondent filed written orders for his rating of cars with both railroads. There was nothing to prevent them from complying with these orders on the 80-20 basis, unless it was the absence of Western Maryland rates from respondent's mine, a condition which that carrier alone was in a position to correct. If their 80-20 offer was *bona fide* and they thought it constituted the measure of their full duty in the premises, why didn't they perform that duty by placing cars on that basis at respondent's mine? Why didn't they complete the "offer" once or twice by making placements of cars on that basis? Their duty to place the cars was greater than, and antecedent to, his duty to accept and load them. He could do nothing to reduce his losses unless and until cars were actually placed for loading at his mine. Where he whose duty it is primarily to fulfill a contract and to prevent damages which may result from a failure has equal opportunity to fulfill the obligation, he alone may be depended upon to perform the duty, and it will not avail him to say that the injured party might have performed the duty for him and thus lessened the damages. *Corpus Juris*, Vol. 17, p. 774; *Louisville, New Albany & Chicago Rwy. Co. v. Sumner*, 106 Ind. 55, 58.

Next, it is contended that the plaintiff in an action for damages is under no obligation to accept a method of reducing his loss which might be construed as an abandonment of his claim, or be likely to work an estoppel against him. *Campfield v. Sauer*, 189 Fed. 576, 579; *Everett v. Em-*

*mons Coal Mining Co.*, 289 Fed. (C. C. A. 4) 686, 691. Suppose respondent had accepted the letter or verbal 80-20 offer and Western Maryland rates had some time later been published from his mine, and he had then ordered and secured his cars on the basis said to be contemplated by the offer, what would petitioners have claimed when he sued them for damages? They would have claimed that he had secured all the cars he was entitled to on the basis of his orders, that he had waived his right to any additional cars, and that he was estopped from claiming damages. And if he had appealed to the Commission for relief, that body would have dismissed his complaint on the ground that no violation of the Act had been shown. See *Reeves Coal Co. v. Chicago, M. & St. P. Ry. Co.*, 37 I. C. C. 707, 708.

Next, it is contended that respondent did all that the mitigation-of-loss rule required of him. He filed daily orders for 100 per cent of his mine rating with the Western Maryland (as the Commission held he had a right to do) and when that road refused to honor the requisitions, he placed his orders with the Baltimore & Ohio, *and further that he accepted and loaded all CARS actually tendered to him by both railroads.* And, at their request, he loaded the cars received as heavily as possible. What more could a reasonably prudent man have done?

Lastly, it is contended that petitioners' persistent refusal to accord respondent's mine a two-road status and to permit him to divide his orders for cars and ship his coal via either or both roads as desired, while contemporaneously according these rights and privileges to the similarly-located and competing Coal Company mines, was not accidental, unforeseen or mere negligence on petitioners' part, but a continuous tort and violation of statutory duty. In such circumstances, the courts have held that the mitigation-of-loss rule does not apply. *Kendall v. Chicago, etc. R. Co.*, 95 S. W. 757, 759; *Galveston, etc. R. Co. v. Zart-*

*zinger,* 92 Tex. 365, 44 L. R. A. 556; *American Smelting & R. Co. v. Riverside Dairy & S. Farm,* 236 Fed. (C. C. A. 8) 510, 514-15; *Wilson v. Scarboro,* 88 S. E. 872, 873; *Borden v. Carolina Power Co.,* 93 S. E. 442, 443; *Heaney v. Heeney,* 2 Denio (N. Y.) 625, 627; *Cardwell v. Norfolk, etc. R. Co.,* 88 S. E. 495, 496; *St. Louis, Southwestern R. Co. v. Lee,* 151 S. W. 331; *Corpus Juris,* Vol. 17, pp. 777-8.

This Court has held that the rights of a shipper under the Act cannot be varied by the contract or tort of the carrier. *Keogh v. Chicago & N. W. R. Co.,* 260 U. S. 156, 163. See also *Williar v. Canadian N. Q. Ry. Co.,* 17 I. C. C. 304, 305; *Mississippi River & B. T. Ry. Co. v. Director General,* 55 I. C. C. 674, 678-9; *Clark Davis Coal Co. v. Director General,* 53 I. C. C. 357, 360; *Coakley v. Director General,* 59 I. C. C. 141, 144-5.

For the foregoing reasons and those stated by the Court below, it is contended that the Commission's action was erroneous as a matter of law. By multiplying the additional tonnage which the Commission found respondent would have produced if he had accepted the 80-20 offer by the profit per ton and totaling the results, a grand total of $34,310.67 is secured. If this amount with interest is added to the amount of the reparation order with interest, a total of approximately $70,905.00 is secured, or more than sufficient to cover the judgment.

(b) As for the average loading finding and deduction, the Commission's enumeration of petitioners' contentions at the hearing on damages shows that they made no attack whatsoever upon respondent's average loading of 53.55 tons per 50-ton car, or upon the use of such loading in determining the lost tonnage (R 26). His computations in this respect were not questioned. Furthermore, the petition shows that petitioners requested him to load his cars as heavily as possible, that he complied with their requests to the extent stated, and that no issue in respect thereof

was raised in the complaint to the Commission or the petition in court. It must therefore be presumed that petitioners in making the requests, and respondent in complying with them, acted within any applicable rule on the subject. The Commission made no finding to the contrary. Its finding was that 50 tons was used in the rules for determining the daily *rating* of a mine expressed in cars and in those governing the *distribution* of cars to coal mines. It made no finding that any rules provided that after the cars were distributed, 50 tons per car was the maximum *loading* permitted therein.

The Commission's own findings do not, as a matter of law, support the average loading deduction. It was therefore void. *Interstate Commerce Com. v. Louisville & N. R. Co.*, 227 U. S. 88, 91.

5. Petitioners' contention that verdict and judgment were unattainable without inclusion of the greater part of the damages avoidable "by acceptance of the offered car supply" and without inclusion of most of the amount disallowed by the Commission is baseless and untenable. The implication in the contention that respondent rejected an "offered CAR SUPPLY" is without foundation in fact. Both the petition proper and the Commission's report attached as exhibit B show that he accepted and loaded all the cars he received from both railroads.

Petitioners point to delimited portions of the opinion in *Pennsylvania R. Co. v. Jacoby*, 242 U. S. 89, 99 and (second appeal) *Pennsylvania R. Co. v. Weber*, 257 U. S. 85, 86, 91. There, the plaintiff sued for and finally recovered judgment for the amount of a reparation order which the Commission had arrived at on a basis "manifestly not intended by the Act of Congress". The first judgment for the apparently-excessive award was reversed and the case remanded, the plaintiff having relied exclusively upon the Commission's report. The second judgment *for the same*

*amount* was affirmed, notwithstanding the "inescapable conclusion" of this Court that the Commission had used a wrong basis in arriving at the amount of its award. But the second judgment was supported by other evidence than the Commission's report, which evidence this Court examined and found adequate. The other evidence consisted of "testimony tending to show" a basis of recovery sufficient to cover the judgment.

The record in the instant case contains no bill of exceptions. It must be assumed here that the trial proceeded as the statute requires, that the evidence presented was sufficient to support the verdict, and that the trial judge was justified in using the verdict as the basis for the judgment. There is no room for an "inescapable conclusion" to the contrary, especially as verdict and judgment were for over $22,000.00 less than the amount sued for and also for over $22,000.00 less than the Commission's computation of respondent's damages plus interest.

III.

**Respondent's right of action and the District Court's jurisdiction were not limited in maximum amount to the Commission's award. This is a Section 16 (2) suit for damages resulting from violations of the Interstate Commerce Act, filed pursuant to a reparation order of the Commission not complied with by the carriers. The fundamental principles of equality and uniformity underlying the whole statute, as well as the plain language of section 16 (2) itself, compel the conclusion that in such suit the plaintiff has the right to recover, and the District Court the jurisdiction to give judgment for, the full amount of damages sustained, even though such amount is greater than the Commission's award.**

1. A claim for damages under the Act is "a claim not for a penalty but for compensation (and) is a property right". *Spiller v. Atchison, T. & S. F. R. Co.*, 252 U. S. 117, 135. The measure of permissible recovery is the "full amount of damages" sustained by the person injured. *Section 8.* This measure embraces any and all damages, "whatever their nature", and "whatever the amount", traceable to the particular violation complained of. *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 203, 206; *Louisville & N. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 291.

2. While the Act fixes a single standard or measure of recovery, it provides two alternative methods or means of recovery. These are, complaint to the Commission or suit in a Federal District Court of competent jurisdiction, subject to the limitation that the person or persons claiming to be damaged "shall not have the right to pursue both of said remedies", but "must in each case elect which one of the two methods of procedure herein provided for he or they will adopt". *Section 9.* If the damages result from violations which require the administrative ruling of the Commission to determine them, these two "methods of procedure" are exclusive; they are the only means of recovery available to the injured shipper. *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 128; *Pennsylvania R. Co. v. Clark Bros. C. M. Co.*, 238 U. S. 456, 471.

To "pursue" is to adopt measures to obtain. By giving the injured shipper the right to pursue only one of two federal remedies, compelling him to elect which one he will adopt, Congress clearly intended that each of the two was to comprehend whatever measures are necessary to secure recovery of the statutory standard of full compensation. It is also clear that each remedy was to be as adequate and complete as the other; indeed, that each was to be the equal of the other in final results. This is so because the funda-

mental principles of equality (the "primary purpose of the Act", *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S. 173, 181) and uniformity (the "paramount purpose of the Commerce Act", *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 290) permeate Section 9 no less than the other provisions of the statute. Pursuant to this view, this Court has held that whether complaint is filed with the Commission or suit is brought in court, the same period of limitation applies (*A. J. Phillips Co. v. Grand Trunk R. Co.*, 236 U. S. 662, 667); the cause of action accrues at the same time (*United States ex rel Louisville C. Co. v. Interstate Com. Com.*, 246 U. S. 638, 644); the same starting basis, a finding by the Commission on the administrative question, is required (*Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 436-7, 441-2, 446); and the same rules of law prevail, "the rule of damages in one hardly can be different from that proper for the other" (*Louisville & N. R. Co. v. Ohio Valley Tie Co., supra*, p. 291).

But to make certain that both methods of procedure will be controlled by the same rules of law and hence culminate in like final results, they must be construed as subject also to the same judicial machinery for correcting errors and mistakes. If one of two injured shippers, having secured the Commission's affirmative finding on the administrative question, seeks recovery of damages in a District Court, errors committed by that trial tribunal in determining the amount of damages may be corrected by appeal and new trial. If the other shipper seeks recovery by the alternative method of procedure, i. e., by carrying on before the Commission, similar errors committed by that body in determining the amount of damages may also be corrected by the courts. And, as in the new trial of the first shipper's case, the amount of the reversed judgment is not the maximum limit of recovery, so in that of the second shipper's

case, the amount of the Commission's award is not. In both new trials, the statutory standard of full compensation, whether more or less than the first judgment or award, remains the measure of permissible recovery. These conclusions follow for the same reasons of equality, uniformity and consistency with the underlying purpose of the Act so repeatedly stressed by this Court in passing upon other features of the two remedies. The identical reasons held by this Court to require the preliminary administrative ruling of the Commission to initiate the Section 9 method of procedure in a District Court in certain cases, call for the corrective aid of the courts to perfect and complete the Section 9 method of procedure before the Commission. "In other words, the Act cannot be held to destroy itself". *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 446. It cannot be assumed that Congress, having erected a guide post directing shippers to use either of two federal-aid highways to reach a common goal, intended to leave one of them without a bridge over the river of errors and mistakes.

3. The necessary bridge is provided in Section 16 (2). It was under this section that the present suit was instituted. So far as material here, it reads as follows—

> "If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the Circuit (now District) Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the Circuit Court of the United States

> shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the Circuit Court nor for costs at any subsequent stage of the proceeding unless they accrue upon his appeal," etc.

The foregoing suit is an adjunct of the "method of procedure" before the Commission referred to in Section 9, and part and parcel of that particular "remedy". It is a trial *de novo* of the action with the same corrective function, scope and power as the new trial in the alternative method of procedure in a District Court.

The language describing "such suit" is clear and plain. It is not of doubtful meaning or susceptible upon its face of two constructions. "Such suit *shall* proceed in *all* respects *like other civil suits for damages*" with two, and only two, exceptions, neither of which limits recovery to the Commission's award. When an exception is incorporated in a statute, it excludes all others than the one expressed, and the courts are not at liberty to ingraft other exceptions. *Expressio unus est exclusio alterius. Kendall v. United States,* 107 U. S. 123; *Ford v. United States,* 273 U. S. 593, 611. Moreover, one of the two exceptions makes the Commission's order merely *prima facie* evidence of the facts stated therein, a circumstance constituting conclusive proof that the amount awarded thereby was not intended to be the absolute maximum recoverable in the suit.

In this connection, it is significant that the Section 16 which became part of the statute March 2, 1889, and continued in effect until the enactment of the Hepburn Act June 29, 1906, the source of the present Section 16 (2), provided that the petition was merely to allege "such violation or disobedience (of the order or requirement) as the

case may be". 25 Stat. L. 860-1.* It contained no provision that the petition was to set forth the "causes for which he (complainant) claims *damages*", or that the "suit shall proceed in all respects *like other civil suits for damages*", or any other provision of similar import. The word "damages" did not appear in the whole section. These facts clearly indicate that by the new Section 16 (2), Congress intended to increase the rights of the shipper; whereas under the old section, his suit was on the award to recover the amount of same, under the new it is a plenary suit for damages not limited in maximum amount to the award.

The Hepburn Act also enlarged the venue provisions of such suits, and this Court referred to the significance thereof as follows in *Vicksburg, Shreveport & Pac. R. Co. v. Anderson-Tully Co.*, 256 U. S. 408, 413—

> "* * * the two principal amendments to the Interstate Commerce Act of 1887 show that it has been the plainly expressed policy of Congress to make the prosecution of suits upon reparation orders for the payment of money progressively easier and less expensive for the shipper."

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*The material part of the section was as follows—

If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice given by said Commission as provided in the fifteenth section of this Act, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the circuit court of the United States sitting as a court of law in the judicial district in which the carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be; and said court shall by its order then fix a time and place for the trial of said cause, which shall not be less than twenty nor more than forty days from the time such order is made, and it shall be the duty of the marshall of the district in which said proceeding is pending to forthwith serve a copy of said petition, and of said order, upon each of the defendants, and it shall be the duty of the defendants to file their answers to said petition within ten days after the service of the same upon them as aforesaid. At the trial of such suit the findings of fact of said Commission as set forth in its report shall be prima facie evidence of the matters therein stated, and if neither party shall demand a jury or shall omit to waive a jury the court shall, by its order, direct the marshall forthwith to summon a jury to try the cause; but if all the parties shall waive a jury in writing, then the court shall try the issues in said cause and render its judgment thereon.

That under the present section such "suit" is not on the award as such was specifically held by this Court in *Lewis-Simas-Jones Co. v. Southern P. Co.*, 283 U. S. 654, 661. It is a suit for damages actually incurred by the plaintiff. The Commission's findings and order are available as evidence. If they were regularly and properly promulgated (and it is so presumed until the contrary appears), they are conclusive so far as they determine the administrative questions, if any, in the case, but only *prima facie* correct so far as they determine the fact and amount of damages. *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 257-8. To the extent that his cause of action involves administrative questions, the plaintiff is restricted to the Commission's order as proof; he must produce and rely upon it exclusively. But to the extent that it merely involves the fact and amount of his damages, he is not so restricted; he may, if he so desires, produce and rely upon other and additional evidence.

So far as the order is administrative, the plaintiff may not attack it, as such attack would be nothing less than an attempt to have the court substitute its judgment for that of the Commission upon a question committed by law to the exclusive jurisdiction of the Commission, and to evade Section 9 of the Act. If administrative, his cause of action must be within the scope of, and covered by, the Commission's order "*in the premises*", the Commission's affirmative declaration that the defendant violated the Act in the particulars complained of. To the extent that his cause of action lies outside the Commission's affirmative administrative declaration, he cannot maintain the suit. But so far as the order is quasi-judicial, so far as it merely determines the fact and amount of damages, the plaintiff, no less than the defendant, may attack it. He may overcome it with other evidence. He may show that the Commission erred in its mathematical calculations, in the formula used

in arriving at the amount of the award, and in the application of rules of law. This is made clear by the following definition of the *prima facie* clause promulgated by this Court in *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 430—

> "This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacles to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents."

If, after securing the Commission's finding on the administrative question, if any, in the case, the plaintiff shipper elects to proceed in a District Court for damages, and that Court appoints an auditor to conduct a preliminary hearing for the purpose of classifying and compiling the various items making up the claim and of reaching a conclusion as to the amount due, the amount so found is not the maximum limit of permissible recovery. In *Matter of Walter Peterson*, 253 U. S. 300, 311, this Court said—

> "The (auditor's) report will, unless rejected by the court, be admitted at the jury trial as evidence of facts and findings embodied therein; but it will be treated, at most, as *prima facie* evidence thereof. The parties will remain as free to call, examine, and cross-examine witnesses as if the report had not been made. No incident of the jury trial is modified or taken away either by the preliminary, tentative hearing before the auditor, or by the use to which his report may be put."

Therefore, in the Section 16 (2) phase of the alternative method of procedure, which "suit shall proceed in all respects like other civil suits", the Commission's report and order, insofar as they are quasi-judicial and determine the

fact and amount of damages, constitute nothing more or less than an auditor's report and have no greater force and effect than an auditor's report. The order (and report made part thereof) is merely a piece of evidence, and only *prima facie* evidence, to be weighed and considered along with the other evidence in the case. The amount stated in the order is in no sense the maximum limit of permissible recovery. It is not binding upon either party to the case. And, having been arrived at in a proceeding over which the District Court had no control, it is not binding upon the court and does not delimit its jurisdiction. In this connection, this Court further observed in *Matter of Walter Peterson, supra*, pp. 311-12—

> "The reasons for holding an auditor's report admissible as evidence are, in one respect, stronger than for giving such effect to the report of an independent tribunal like the Interstate Commerce Commission. The auditor is an officer of the court which appoints him. The proceedings before him are subject to its supervision, and the report may be used only if, and so far as, acceptable to the court."

4. But what about the limitation in Section 9 that "such person or persons shall not have the right to pursue both said remedies and must in each case elect which one of the two methods of procedure he or they will adopt"? The plain answer is that the Section 16 (2) right of *further* procedure in a *Federal or State* court is not the Section 9 right of *initial* procedure in a *Federal* court. The Section 16 (2) suit *per se* is not either of the Section 9 methods of procedure; it is merely supplemental to one of them and that on the method initiated by complainant to the Commission. After the complainant shipper has secured the Commission's finding on any administrative question involved in his case, and has exercised his right of election between the

two methods of procedure for recovering damages, he is committed to the one selected and must pursue the remedy provided by it. He will not be permitted to change over to the other method, not only because the statute prohibits it, but also because the fundamental principles of equality and uniformity underlying the whole statute give assurance that each method is the equal of the other insofar as final results are concerned. *Pennsylvania R. Co. v. Clark Bros. C. M. Co.*, 238 U. S. 456, 472; *Standard Oil Co. v. United States*, 283 U. S. 236, 241.

So, also, if satisfaction of a reparation order is offered to and accepted by the complainant shipper, he may not subsequently resort to a State or Federal Court for general damages arising out of the same transactions but not, as alleged, included in the Commission's award. When the reparation order is complied with and payment accepted, as when the judgment order of a court is satisfied and payment acknowledged, no further proceeding, initial, corrective or otherwise, in regard to the transactions covered by it may be maintained in any tribunal. All damages attributable to the particular violation of the Act are compensated when payment of the Commission's award in the premises is accepted. *Louisville & N. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 291.

But if the reparation order is not complied with, due either to the refusal of the carrier to make the payment (or that of the shipper to accept it*), the Section 16 (2) suit is available for a judicial review and correction of the Com-

*While the question raised by this contingency is not present in this case, the language of Section 16 (2) is broad enough to permit the suit where non-compliance with the order is due to the shipper's refusal to accept the payment. This is particularly true if the first clause of the section is construed liberally as this Court held in the *Spiller Case*, 252 U. S. p. 315, all reparation provisions of the Act should be construed. In the suit so instituted, the shipper runs the risk of recovering less than the Commission's award, and the carrier can be protected by being relieved of interest on the amount thereof from and after the date of its offer of payment.

mission's mistakes, if any, and a final judgment commensurate with the statutory standard of full compensation, whether more or less than the Commission's award. This is so because if the same or a competing shipper had elected to pursue the alternative method of procedure, and there had been like dissatisfaction with the judgment of the District Court on the part of either defendant carrier or plaintiff shipper, the right of appeal and new trial would have been available for a review and correction of the trial court's errors and an eventual judgment according to the same standard. And in the trial *de novo* of the first case, no less than in that of the second, the amount of the initial award or judgment does not delimit either the plaintiff's rights or the court's jurisdiction.

5. While this Court has never directly and specifically decided the precise question here involved, it has sustained in one case a greater recovery than the Commission's award correctly computed, and has clearly intimated in other cases that the shipper's right of action and the District Court's jurisdiction are not limited in maximum amount to the Commission's award.

In *Pennsylvania R. Co. v. W. F. Jacoby Co.*, 242 U. S. 89, 99, and (second appeal) *Pennsylvania R. Co. v. Weber*, 257 U. S. 85, 90-1, previously referred to herein, this Court affirmed a judgment for the amount of a reparation order, the amount sued for, notwithstanding the "inescapable conclusion" that the Commission had used a wrong basis in calculating the amount thereof; *the award would have been automatically smaller if the correct formula had been applied to the basic figures from which the award was computed.* 242 U. S. pp. 94-7. Among other things, it was said (257 U. S. pp. 90-1)—

> "Under the circumstances here shown, when the case is fairly and fully submitted, as it was in the charge

> **of the judge to the jury, giving a correct basis upon which there might be a recovery of damages, and there is testimony tending to show damages in at least the sum awarded by the Commission, there is no prejudicial error because of the erroneous calculation of the Commission which was the basis of its award."**

In giving a correct basis upon which there might be a recovery of damages, the trial court rectified the Commission's mistake. In affirming the judgment, this Court necessarily upheld the trial court's jurisdiction to correct the Commission's errors and to permit recovery of the statutory measure of damages regardless of the Commission's calculation of the amount. The judgment was based, not upon the Commission's award, but upon other evidence tending to show damages in at least that amount, the amount sued for. It was sustained, not because it was for no more than the Commission's award plus interest, but because it was for no more than the statutory standard of recovery, the full amount of the plaintiff's loss. This is a clear case where both the amount sued for and the recovery permitted were greater than the Commission's award correctly computed, and this Court's affirmance of the judgment for the greater amount is therefore a persuasive precedent for the decision of the court below in this case.*

In *Pennsylvania R. Co. v. Clark Bros. C. M. Co.*, 238 U. S. 456, 472-3, the plaintiff went into a state court while its claim was still pending before the Commission and secured judgment for $41,181.00 trebled, or a total of $124,443.00. Shortly thereafter, the Commission promulgated its report and, out of a claim for $36,401.12, awarded only $31,127.96. See 23 I. C. C. p. 191. This report was brought to the attention of this court (p. 463), and the quite large discrepancy between the claim, judgment and award should be borne in mind in considering the following significant excerpt from the opinion—

*See also *Pennsylvania R. Co. v. Minds*, 250 U. S. 368, 371-5.

"The federal statute governed the plaintiff no less than the defendant. In the situation in which the plaintiff stood after the Commission's finding, *that statute* determined the *extent* of the damages it was entitled to recover with respect to interstate sales and shipments, and the plaintiff was not free to seek another remedy in the state court, and there to secure treble damages under the state statute with respect to the same transactions.

"*This is not to say that the finding of the Commission as to the amount of the damages has any other effect than that prescribed in Section 16 of the Act.* It is simply to hold that the plaintiff, having demanded and obtained the appropriate ruling from the Commission as to the discrimination which had been practiced, was then entitled to proceed for the recovery of damages in accordance with the Act, and not otherwise."

Observe that the Court, having noticed that the Commission's award was less than the claim and also less than the state Court's judgment if not trebled, held that the Federal statute, not the Commission's award, determined the extent of the damages the plaintiff was entitled to recover, particularly as the finding of the Commission as to the *amount* of damages has no other effect than that prescribed in Section 16 (2), to wit, the effect of *prima facie* evidence only.

In *Louisville & N. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 291, the plaintiff secured an order from the Commission for $6,198.00 as reparation for unreasonable rates, and then instituted suit and secured judgment in a state court for over $50,000.00 for general damages arising out of the same transactions but not, as alleged, included in the Commission's award. Payment of the order having been offered to and accepted by the plaintiff, this Court held that all damages attributable to the overcharges (unreasonable rates) "must be taken to have been considered in the award of the Commission and compensated when that

award was paid", and reversed the judgment. But the true significance of the opinion so far as the instant case is concerned lies in the fact that this Court, after pointing out that Section 16 (2) provides that if the carrier does not comply with a reparation order in due time the complainant may sue in a state court, then indicated that the trial court would not be limited by the amount of the Commission's award. The Court said—

> "The decisions say that whatever the damages were, they could be recovered (*Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 202, 203; *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 429); and that *the statute determines the extent of damages* (*Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 472)".

The citation of the *Clark Bros. Case* in support of the holding that the statute determines the extent of damages recoverable in a Section 16 (2) suit is particularly significant for there this Court followed a similar holding with the observation that the reparation order pursuant to which the suit is instituted has only the quality of *prima facie* evidence.

6. The view that the Commission's award is not the maximum amount of permissible recovery is not only compelled by the plain language of the statute and the principles of equality and uniformity in the light of which the statute must be construed, but is the necessary interpretation, as the Court below pointed out, if grave injustice is to be averted. By Section 9, Congress clearly intended to give the injured shipper the right of *voluntary* election between complaint to the Commission and suit in court as a means for recovering his damages. If his cause of action presents questions administrative in character, he cannot avail himself of this right until he has first secured the

Commission's administrative determination of the rule or standard upon which his recovery must depend. *Pennsylvania R. Co. v. Clark Bros. C. M. Co., supra,* p. 469; *Pennsylvania R. Co. v. Puritan Coal Min. Co.,* 237 U. S. 121, 131. If this administrative determination is delayed beyond the two-year period for bringing suit, he must recover his damages before the Commission or not at all. A construction of Section 16 (2) that in such cases the injured shipper is limited in maximum recovery to the Commission's award, even though the amount of the award was arrived at by an erroneous formula, the misapplication of rules of law, or incorrect mathematical computations, would be manifestly unjust. This Court has held that it is "bound to give heed to the rule that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute". *Knowlton v. Moore,* 178 U. S. 42, 77. The more reasonable interpretation of the court below is not only abundantly present in the plain language of Section 16 (2), but is entirely consistent with the underlying purpose of the statute.

Respondent was deprived of his right to a voluntary election of Section 9 remedies in this case. He was compelled to proceed for damages before the Commission or not at all. He proceeded before that body, secured a reparation order which petitioners elected to refuse to pay, filed his Section 16 (2) suit thereon, and recovered judgment for an amount which, although greater than the Commission's award, was less than that body's computation of his damages. The Court below said (R 96)—

> "It seems to us that to deny him the damages which he is in law entitled to recover because of the erroneous view of the Commission as to the law, is warranted neither by the language of the statute nor by any rule of law applicable in the premises."

7. In opposition to the views here urged, petitioners first contend that the "implication of the decisions" has been that a reparation order less in amount than the sum claimed is, as to the diminution, an unreviewable negative order. But the decisions cited, including that in *Standard Oil Co. v. United States,* 283 U. S. 235, 239, do not support the contention. They were with one exception (*Powers v. Cady,* 9 F.(2d) 458,* in which no Commission order was involved) in cases presenting questions administrative in character, and in which the Commission dismissed the complaints. The proceedings before the Commission never arrived at the stage where reparation was even considered. In baseball parlance, the complainants were all "thrown out at first base". The negative orders entered were not reparation orders in any sense of the term. They were negative pronouncements addressed primarily to the administrative questions involved. The claims for reparation fell automatically for lack of administrative bases to support them. For the courts to have reviewed such pronouncements would have been to substitute their judgment for that of the Commission in matters committed by law to the exclusive jurisdiction of the Commission. In the last analysis, the courts declined to intervene, not because the orders were negative, but because the subject matter of the controversies was administrative.

One of the decisions cited to support the "implication" referred to, that in *Alton R. Co. v. United States, supra,* was recently reversed by this Court (77 Law Ed. Advance Opinions 217) because the order, while negative in form, was found to be affirmative in effect. The italicised sentence in the following excerpt gives an indication of the questions pertaining to a Commission order which may be reviewed—

> "The determination of the questions presented is properly within the scope of judicial review of the

*Also *Brady v. United States,* discussed on pp. 54-5 hereof.

> Commission's orders. The questions are not the correctness of its conclusion as to the reasonableness of the divisions, or the correctness of its findings as to any of the factors which the Act directs it to consider in determining reasonableness. *The question is the correctness of the legal principles adopted by the Commission as a basis for reaching a conclusion from its findings.*"

In the recent case of *United States v. Interstate Commerce Commission*, No. 5816, decided January 30, 1933, the Court of Appeals of the District of Columbia granted a writ of mandamus to the Commission for reasons sufficiently indicated by the following excerpt from the opinion—

> "If we should hold that the commission may not be required to reach a conclusion consonant with its own findings, section 16 of the act would, we think, be meaningless. It would be to construe the language of the section—"If the commission shall determine that any party complainant is entitled to an award of damages"—to mean that the discretion of the commission—to "determine"—was not subject to challenge on any ground and that the commission's *ipse dixit* would control against the plain mandate of the act. We think this is not the law."
>
> In this case the commission has found, as we have pointed out, unlawfulness of rate, injury and damage, and the amount of loss. In these circumstances nothing more is necessary than the mere matter of the multiplication of the number of cars by the ascertained overpayment per car."

Likewise, in a Section 16 (2) suit, the determination of questions relating to the amount of damages is properly within the scope of judicial review. The soundness of the Commission's administrative finding and the appropriateness of its administrative standard may not be questioned, but "the correctness of the legal principles adopted by the Commission as a basis" for determining the amount of damages due under that standard may certainly be review-

ed by the trial court. In the instant case, respondent did not attack the Commission's administrative ruling or standard. He did not ask the District Court to substitute its judgment for that of the Commission regarding those administrative matters. On the contrary, he prayed the Court to give heed to and "enforce" them fully.

Petitioners also refer to *Standard Oil Co. v. United States, supra,* in support of the proposition that after an unsuccessful application to the Commission to recover damages, a plaintiff is barred by Section 9 from resorting to a court, and apply the doctrine thereof to the instant case by insisting that respondent, having secured an award of $12,838.31 plus interest from the Commission, is now barred from recovering more than that amount in court. But respondent's application to the Commission was not unsuccessful, and this suit was not instituted under Section 9. On the contrary, his complaint to the Commission under Section 9 resulted in a pronouncement that petitioners' acts and practices had been unlawful, a prescription of the standard that should have prevailed, and an award of damages in his favor, which petitioners elected to refuse to pay. He then brought this proceeding under Section 16 (2), which is nothing more than an adjunct of the method of procedure which he instituted initially before the Commission. It is not a new and independent suit under Section 9, as was that of the Standard Oil Co. That company had no affirmative administrative pronouncement, no administrative standard, no basis, no award, no "order", upon which to institute a Section 16 (2) suit. Accordingly, it attempted to have the court substitute its judgment for that of the Commission upon the administrative questions involved and to pursue what this Court regarded in substance and effect as another Section 9 remedy. It was held that it could do neither.

Some significance is attached to the fact that the *Standard Oil Co. Case* is cited in this Court's memorandum opin-

ion affirming the decree of dismissal in respondent's equity proceeding. The decision in the *Standard Oil Co. Case* was based upon three grounds. The first two dealt with the fact that as the Commission had dismissed the company's complaint involving matters essentially administrative in character, the order was negative in form and effect and the suit to annul it an attempt to have the court usurp the functions of the Commission. The third ground was that the suit was "nothing less than an attempt to avoid the statute by indirection", i. e., to start a second proceeding in respect of the same claims in direct contravention of Section 9 of the Act. The first two grounds were not applicable to respondent's equity proceeding. The third was applicable, peculiarly so, as respondent's action at law for the full amount of his loss was still pending in the District Court.

Petitioners also contend that if the power of judicial review is conferred on the multitude of state courts (as Section 16 (2) provides), there would be a possibility of varying and conflicting judgments as to the Commission's orders. But in *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 290, it was said—

> "If the parties properly preserve their rights, a construction given by any court, whether it be Federal or State, may ultimately be reviewed by this Court, either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured."

Lastly, petitioners contend that Section 16 (3f) of the Act indicates that the Commission's award is intended to be the maximum amount recoverable in a Section 16 (2) suit. Section 16 (3f) provides that a "*petition*" for the *enforcement* of an order of the Commission for the payment of money shall be filed in the District Court within one year from the date of the order and not after." It merely limits the time within which the "petition" referred to

may be filed. It does not limit the scope of that "petition" or the scope of the "suit" instituted by that "petition". For a definition of that "petition" and that "suit", resort must be had to Section 16 (2). There it is provided that the "petition" is to set forth the "causes for which he (complainant) claims *damages,* and the order of the Commission in the premises", and that the "suit *shall* proceed in *all* respects like other civil suits for *damages*" with only two exceptions, neither of which limits the amount of permissible recovery, and one of which limits the weight to be given the Commission's order to "*prima facie* evidence of the facts therein stated."

While the immediate purpose of Section 16 (3f) is to limit the time within which the Section 16 (2) suit may be instituted, its ultimate purpose and effect are to extend the Section 16 (3b) period of limitation in order to insure equality of treatment. Section 16 (3b) provides that "all complaints against carriers * * for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after * *." Although the two year period of limitation does not specifically apply to actions for damages instituted in courts of law, this Court has held that it must be so construed. *A. J. Phillips Co. v. Grand Trunk R. Co., supra.* Now if one of two injured shippers seeks recovery of damages in a District Court, he secures a *final* adjudication of his claim according to law and a judgment on which execution may issue, no matter how long it takes to secure the judgment. If the other shipper seeks recovery of damages by carrying on before the Commission, he secures a sort of *tentative* adjudication, and a piece of *prima facie* evidence on which execution may not issue. *Pittsburgh & W. V. R. Co. v. United States,* 6 F. (2d) 646, 648. If more than two years have elapsed since his cause of action accrued, it would be impossible for him, *but for*

*Section 16 (3f),* to secure what the other shipper has secured, to wit, a final adjudication of his claim according to law and a judgment on which execution may issue. The ultimate effect and purpose of that section, therefore, are to extend the Section 16 (3b) period of limitation for Section 16 (2) suits in order to insure equality of treatment to shippers who seek recovery of damages before the Commission.

Furthermore, as hereinbefore pointed out, the "order" for the "enforcement" of which the Section 16 (2) suit is instituted may have a dual characteristic; it may be partly administrative and partly quasi-judicial. So far as it is administrative, it is the same as a statute and conclusive on the court. So far as it is quasi-judicial and determines the fact and amount of damages, it is only *prima facie* correct. In a suit to *enforce* such an order, the administrative standard, not the amount of the award, is the measure of the plaintiff's rights and the trial court's authority. The court is to "enforce" the standard whether the result is a money judgment more or less than the Commission's award.

## IV.

**The questions whether respondent had a right of action for, and the District Court jurisdiction to grant recovery of, a greater amount than the Commission's award are res judicata, having been determined by the decree in Brady v. Interstate Commerce Com., 43 Fed. (2) 847, affirmed Brady v. United States, 283 U. S. 804.**

1. These questions were among those presented for determination in the equity proceeding above cited, which was instituted in the same District Court and at about the same time as was the instant action at law. The bill of

complaint attacked the deductions made by the Commission from the gross amount of respondent's damages. It was represented that unless they were set aside and annulled respondent would be subjected to irreparable injury for which he had no plain, adequate and complete remedy at law. The court was asked to set aside and annul them, direct the Commission to make a supplemental order consistent with the decree of the court, and to grant such further relief, etc. The respondents moved to dismiss for lack of jurisdiction. (R 8, 97-8; also 43 Fed. (2) pp. 848, 849).

The Court (Circuit Judges Parker and Northcott and District Judge Baker) decided the question or questions as follows (R 98; 43 Fed. (2) p. 852)—

> "If the party in whose favor it (reparation order) is made is not satisfied with it, he may in instituting his suit set forth the cause of action for which he claims damages, and the order of the Commission, and have his case proceeded with "in all respects like other civil suits for damages" except that on the trial the findings and order of the Commission shall be *prima facie* evidence of facts therein contained. There is nothing in the Act, we think, which limits his recovery to the amount awarded by the Commission and there is no reason why the recovery should be so limited. The order and findings of the Commission are *prima facie* evidence, just as is the report of an auditor in an action at law. *Ex parte Peterson*, 253 U. S. 300. *** It is apparent, therefore, that no irreparable injury is to be apprehended from reparation orders of the Commission, that any errors therein may be corrected in the trial provided for by statute, and that resort to injunction to set aside such orders is not permissible.
>
> "*For the reasons stated*, we think that the Court is without jurisdiction to entertain the suit, and the bill will accordingly be dismissed."

The plaintiff (respondent here) in the law action was the complainant in the equity proceeding. The two defendants (petitioners here) in the law action were respondents in the equity proceeding, *having voluntarily intervened,* submitted themselves to the jurisdiction of the Court, and participated by counsel in the hearing (43 Fed. (2) p. 848).

2. Every element necessary to, and justifying the application of, *res judicata* is present. There is an identity of parties. There is an identity of *questions* and *rights* involved, the contested *questions* and *rights* common to both proceedings being whether respondent had a right of action for, and the District Court jurisdiction to grant recovery of, a greater amount than the Commission's reparation order. These *questions* and *rights* were actual issues in the equity proceeding. They were presented to a court of equity, so the initial *questions* and *rights* which that court had to determine were those inherent in the proposition whether the first prerequisite to its jurisdiction as a court of equity was disclosed by the bill. They had to be settled *in limine.* As said by this Court in *Singer Sewing Mach. Co. v. Benedict,* 229 U. S. 481, 484—

> "In courts of the United States it is a guiding rule of law that a bill in equity does not lie in any case where a plain, adequate and complete remedy may be had at law. The statute so declares (citing statute), and the number of decisions enforcing it are without number. If it be quite obvious that there is such a remedy, it is the duty of the court to interpose the objection *sua sponte,* and in other cases it is treated as waived if not presented by the defendant *in limine.*

See also *United States v. Bitter Root Development Co.,* 200 U. S. 451, 472.

Any and every court of equity has inherent power to prevent irreparable injury, and hence inherent power to

pass upon questions and rights involved therein. These questions and rights were settled by the special court; it dismissed the bill for lack of jurisdiction "for the reasons stated", one of which was that "no irreparable injury is to be apprehended from reparation orders of the Commission, that any errors therein may be corrected in the trial provided for by statute, and that resort to injunction to set aside such orders is not permissible". And petitioners, having participated in the litigation, are bound by the decision.

In *United States v. Moser,* 266 U. S. 240, 242, it was said—

> "Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact, question,* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law. That would be to affirm the principle in respect to the thing adjudged, but, at the same time, deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based." (Emphasis by the Court).

3. Petitioners say *res judicata* was never pleaded by respondent. Respondent was the complainant in the equity proceeding.* Furthermore, the two actions were carried on simultaneously in the same District court, the petition in the law action referred to the pendency of the equity proceeding, and the judgment in the first case finally determined was automatically decisive of the foregoing common questions and rights in the case left remaining.

Next they say the stated conclusions of the court in regard to the jurisdictional question now being discussed

*And the one-year statute of limitation had run when the special court's decision was announced.

were *obiter dicta.* They were not *obiter dicta.* The questions and rights involved therein were distinct issues in the case, were within the general powers of the courts to determine, and had to be determined; indeed, it was the court's duty to determine them *sua sponte in limine.* In any event, they were squarely raised and fully argued. And the court, "noticing the contention of plaintiff (respondent here) that he stood in danger of irreparable injury", actually and conclusively determined them. In *Florida C. R. Co. v. Schutte,* 103 U. S. 143, it was said—

> "As to the first question, we deem it sufficient to say that the Supreme Court of Florida has distinctly decided that in the case of this company, as well as the other, the statutory authority was complete. The point was directly made by the pleadings and as directly passed on by the court. Although the bill in the case was finally dismissed because it was not proved that any of the State bonds had been sold, the decision was in no sense dictum. It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion."

This Court gave no reasons for affirming the decree in the equity proceeding, but petitioners attempt to supply them by what they term the "proper interpretation" of the citations in the memorandum opinion. It is respectfully submitted that whether this Court travelled the same route all the way, or a different route part or all of the way, as the special court travelled, is immaterial. The important fact is that this Court reached the same goal as did the special court; it affirmed the decree of that court. In *Russell v. Russell,* 134 Fed. (C. C. A. 3rd) 840, 841, it was said—

> "A question expressly determined by a court of equity, whose decree is affirmed on appeal, is *res judicata* between the parties, although such question was not considered by the appellate court, whose affirmance was based on other grounds."

When it is remembered that an entirely erroneous adjudication of a *fact, question* or *right* in one proceeding may not be disputed in a subsequent action between the same parties *(United States v. Moser, supra)*, there is certainly a world of room for the proposition that the special court's determination of the foregoing questions and rights in the equity proceeding may not be disputed in the instant case. That determination is the "law of this case."

## CONCLUSION.

It is respectfully submitted that the judgment below should be affirmed.

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